Colorado Voters' Power of the Purse
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Current and former lawmakers are taking the Taxpayer Bill of Rights to court for a second opinion.

Many states have provisions designed to limit the amount of taxes their legislatures can raise, but only Colorado has gone so far as to pass the Taxpayer Bill of Rights. Known as TABOR, Colorado’s unique constellation of confusing laws prevents the state legislature from raising taxes without public approval and caps the amount the government can spend in a way that’s designed to shrink it over time. All levels of government—city, county, and state—are limited in what they can spend by a complicated formula, which basically indexes revenue to inflation plus population growth. If the tax revenues the state and local governments collect in any given year are higher than the cap, which happens in good economic times or when there is an influx of new residents, states and cities are required by law to refund taxpayers. Over the years, more than 80 cities have passed local referendums to relieve their governments from some of the burdens of TABOR. Last week, Denver voters passed, by a margin of 74 percent to 26 percent, a referendum that allows the city to keep the surplus money it has already collected and spend it. The referendum they voted for is called “de-Brucing,” named after the law’s anti-tax activist Douglas Bruce. (On the state level, a de-Brucing referendum passed in 2005.) The city argued that without de-Brucing, it
would no longer be able to provide basic city services; it hadn’t trained a new firefighter or police officer
class in four years.

But the bigger problems with TABOR still exist. In a bad year, if revenues are less than expected, the
revenue cap is reset at a lower level for the following years. That means that, over time, government
shrinks relative to the population or the size of the state’s gross domestic product. Voters did away with
that provision at the state level in a 2005 referendum, but local governments are still affected by the cap.
And the state legislature is prohibited by TABOR from changing tax rates and from making its tax system
more progressive; in addition, because Bruce was a real-estate developer, there is no longer a real-estate
transfer tax in the state. “It has profoundly affected policy,” says Wade Buchanan, president of the Bell
Policy Center in Colorado. “The only way now in Colorado to raise revenues or to actually keep revenues
that come in is to go to the vote of the people. That makes it very daunting.” Since the Great Recession
led to several bad years, the effects of TABOR have been thrown into sharp relief. Most dramatically,
Colorado Springs ended city services like parks maintenance and dimmed street lamps for part of 2010
after residents there refused a local tax hike.

Earlier this year, 31 current and former lawmakers filed a lawsuit they hope will rid the state of TABOR
forever. Mike Feeley is a former Democratic state legislator and an attorney for the plaintiffs in the suit,
and he says that the bipartisan support for finally changing TABOR meant that all the lawmakers who had
been hoping to challenge it in court finally felt there was a critical mass of support to do so. “I’m a
Democrat, I didn’t vote for a single tax increase,” in his eight years in office, he says. “I probably would
have given the chance. All I had to do was spend the money.” That, he argues, lets legislators off the
hook: They never have to make the tough decisions voters elected them to make in the first place.

The lawsuit argues that TABOR has limited the powers of the legislature to the point that Colorado no
longer has a republican form of government, which violates both the U.S. Constitution and the act that
made Colorado a state in 1876. Jon Caldara, president of the libertarian/conservative Independence
Institute, says the fact that lawmakers are frustrated with TABOR means that TABOR is working as
intended. “All elected officials hate the Taxpayer Bill of Rights. It requires them to do one of two things
they despise,” he says: They have to set spending priorities or make their case to the people that they
should have more money to spend. “TABOR is ultimately flexible, because you can spend as much
freaking money as you want to spend—all you have to do is ask first.”

It sounds fine in theory: Lawmakers have to convince their constituents that their project is worth the
money. In the abstract, TABOR gives citizens the right to weigh in on their level of taxation. Most
citizens here think of TABOR in this way. In reality, however, TABOR constrains government, the
plaintiffs argue. Constitutionally, the state must fund three things: K-12 education, Medicaid, and corrections. Everything else, from higher education to funding for fighting wildfires, goes by the wayside.

Politicians can be timid about going on public record asking for a tax increase, especially because, if their initiative fails, they’ll get the blame for trying to raise taxes without a shiny new project to point to as a benefit that make taxes worthwhile. Mostly, Feeley says, the process of setting taxing and spending priorities is a long, confusing one for people who aren’t normally part of the legislative process. “The legislature is elected to make those tough decisions,” he says. “The people aren’t. They expect the legislature to do that, so there’s a disconnect there.”

The Bell Policy Center studied the effects of TABOR in 2003, ten years after it went into effect and before the state-level de-Brucking referendum passed in 2005. The study compared Colorado to states with similar levels of government spending and tax revenue collection and found that Colorado ranked ninth of 11 peer states in appropriations growth for schools, and tenth in higher education. (A separate lawsuit resulted in a ruling that the state’s school-funding formula for K-12 schools is unconstitutional. Some districts, especially in the rural South, are so strained they hold classes only four days a week. Though the problem is not directly attributable to TABOR, it certainly doesn’t help that its funding levels are limited.)

Proponents argue that Colorado saw unprecedented levels of growth in the years after TABOR went into effect and that the fact that it’s ranked 15th in the country in per capita income shows that TABOR works to foster economic growth and wealth. The Bell Policy Institute says that happened in spite of, not because of, TABOR: The state’s population was one of the fastest growing in the country, and the growth in income began before TABOR passed. Other states seem to agree. When Arizona tried to pass a similar law this year, Republican Governor Jan Brewer vetoed the measure. “We should learn from the state of Colorado that experimented with a similar measure, and failed,” Brewer wrote in her veto letter.

The lawsuit against TABOR has already cleared one hurdle. The state had argued that the suit was a political question, not one for the courts to decide. But the precedent state lawyers cited addressed the referendum process in general, and the plaintiffs had narrowed their argument to say that TABOR prevented Colorado from having a fully effective legislature, which in turn meant that Colorado had a non-republican form of government. To the surprise of most observers, a federal judge sided with the plaintiffs and allowed the lawsuit to go forward after the state filed a motion to dismiss. “I breathed a sigh of relief, because it was a professional validation in a way,” says Feeley, who became a state legislator in 1992, the year TABOR passed, and has been fighting it since.
There is little case law on what a fully effective legislature is or, for that matter, what constitutes a republican form of government. The plaintiffs argue that the definition rests on James Madison’s writing in *The Federalist No. 10*, a long treatise on the difference between a direct democracy and a republic. Rob Natelson, a former constitutional law professor and a senior fellow with the conservative Independence Institute, says the plaintiffs are taking Madison’s writing out of context, and that it’s not specified that a republic requires a legislature. To Madison, direct democracy meant rule by the crowd in a market place without any sort of state apparatus, he says. Dictionaries and other writings of the time conflated “democracy” and “republic” all the time, and a perceived difference between the two didn’t arise until the 1840s, he says. More important, he believes the courts won’t want to weigh in because a decision striking down TABOR would wreak havoc on the referendum or initiative process in any state, or in any state where there are some restrictions on revenue collection and spending. “I’d be very surprised if the case goes anywhere for those reasons,” he says.

Feeley argues that the lawsuit just addresses TABOR because TABOR is the only law that restricts the essential function of a legislature—voters can constitutionally impose their will on the legislature, but Colorado’s is prevented from actually doing its job, he says. “TABOR reached into 200 years of legislative prerogative and took away the right of the legislature that it had always had,” he says. “It specifically conflicts with other state constitutional provisions where the legislature is supposed to levy taxes to meet state expenditures, and it also conflicts with what every other state in the country has done.”